UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREE SPEECH, by its Member GREG RUGGIERO; STEAL THIS RADIO; DJ THOMAS PAINE; DJ CARLOS RISING; DJ SHARIN; DJ.E.S.E.; FRANK MORALES; and JOAN MUSSEY, Plaintiffs, - against - JANET RENO, as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; and the FEDERAL COMMUNICATIONS COMMISSION, Defendants.	:98 Civ. 2680 (MBM)
FEDERAL COMMUNICATIONS COMMISSION, Counterclaim-Plaintiff, - against - STEAL THIS RADIO; DJ THOMAS PAINE; DJ CARLOS RISING; DJ SHARIN, and DJ.E.S.E., Counterclaim-Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO GOVERNMENT'S MOTION FOR PRELIMINARY INJUNCTION AND TO DISMISS PLAINTIFFS' COMPLAINT [CORRECTED COPY]

PRELIMINARY STATEMENT

Plaintiffs Free Speech, Steal This Radio, DJ Thomas Paine, DJ Carlos Rising, DJ Sharin, DJ.E.S.E., Frank Morales, and Joan Mussey, respectfully submit this memorandum of law in opposition to the Government's Motion for a Preliminary Injunction and to Dismiss Plaintiffs' Complaint.

ARGUMENT

I.

THE COURT SHOULD DENY THE GOVERNMENT'S REQUEST FOR A PRELIMINARY INJUNCTION

A. THE MERE FACT THAT STEAL THIS RADIO IS OPERATING WITHOUT A BROADCAST LICENSE DOES NOT BY ITSELF JUSTIFY ISSUANCE OF A PRELIMINARY INJUNCTION

"Traditionally and generally, 'a preliminary injunction may issue if the plaintiff demonstrates irreparable harm, and either a a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor.'" Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 478-79 (2d Cir.)(quoting Polymer Technology Corp. v. Mimran, 975 F.2d 58, 61 (2d Cir. 1992)), cert. denied, 515 U.S. 1122, 115 S. Ct. 2277 (1995). It is equally well settled that a "showing of irreparable harm is '[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction'" in most, if not all, cases. Alliance Bond Fund, Inc. v. Groupo Mexicano De Desarrollo, S.A.,

143 F.2d 688, 696 (2d Cir. 1998), quoting Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985), quoting Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983), quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 431 (1973) (footnote omitted)

The Government nonetheless argues that to obtain a preliminary injunction under 47 U.S.C. § 401(a), it need only demonstrate that "there is reasonable cause to believe that a violation of the Act has occurred or is about to occur and that there is a reasonable likelihood that the wrong will be repeated." Gov. Mem. at 7 (internal quotations and citations omitted). Because Steal This Radio is admittedly operating without a broadcast license, in violation of Section 301 of the Act, 47 U.S.C. § 301, the Government insists that it is entitled to the issuance of a preliminary injunction against Steal This Radio's unlicensed broadcasts. Gov. Mem. at 8-9. That simply is not so.

The mere fact that district courts are empowered under Section 401(a) to enjoin violations of the Act, including unlicensed radio broadcasts, "hardly suggests an absolute duty to do so under any and all circumstances, [since] a federal judge sitting as chancellor [in equity] is not mechanically obligated to grant an injunction for every violation of law." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 102 S. Ct. 1798, 1803 (1982) (citations omitted). Indeed, in most cases, "injunctive relief does not follow automatically upon a finding of statutory violations . . . On the contrary, '[a]n injunction should issue only where the intervention of a court of equity is essential in order effectually to protect . . . rights against injuries otherwise irremediable.'" Town of Huntington v. Marsh, 884 F.2d 648, 651 (2d Cir. 1989), (quoting Romero-Barcelo, 456 U.S. at 312, 102 S. Ct. at 1803) (emphasis added), cert. denied, 494 U.S. 1004, 110 S. Ct. 1296 (1990).

While Congress may constrain a district court's equitable discretion to grant or deny a statutory injunction, any such legislative intent is "not [to be] lightly assume[d]":

"[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

Romero-Barcelo, 456 U.S. at 313, 102 S. Ct. at 1804 (quoting Porter v. Wagner Holding Co., 328 U.S. 395, 398, 66 S. Ct. 1086, 1089 (1946)); accord Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 591 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made"). There is nothing in the language of Section 401(a) even remotely suggesting, let alone unequivocally stating or necessarily implying, that Congress intended to restrict a district court's equitable discretion in granting or denying a statutory injunction against violations of the Act.

When Congress chose to restrict a district court's equitable discretion in ruling on a statutory injunction, it plainly knew how to express that intent, as, for example, in Section 401(b) of the Act, which not only empowers a district court to enjoin the failure or refusal of any person to obey an FCC order but also requires the court to issue such an injunction if it "determines that the order was regularly made and duly served, and that the person is in disobedience of the same." 47 U.S.C. § 401(b). The absence of any comparable language in Section 401(a)--the companion to Section 401(b)--necessarily implies that Congress never intended to similarly require district courts to enjoin each and every failure or refusal to comply with the Act. Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991)("In general, congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it so indicated").

The Government's suggestion that irreparable harm may be presumed from the mere fact of Steal This Radio's unlicensed broadcasts (Gov. Mem. at 6-9) is not only "contrary to traditional equitable principles" but also "has no basis in [the Act]." Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545, 107 S. Ct. 1396, 1404 (1987). To presume such harm merely from Steal This Radio's failure to obtain a broadcast license from the FCC is to "erroneously focus[ ] on the statutory procedure rather than on the underlying substantive policy the process was designed to effect . . . ." Id. at 544, 107 S. Ct. at 1403; accord Town of Huntington v. Marsh, 884 F.2d at 653 ("[A] threat of irreparable injury must be proved, not assumed, and may not be postulated eo ipso on the basis of procedural violations of [the statute]").

The Second Circuit has thus often declined to presume irreparable injury merely from statutory violations. Town of Huntington v. Marsh, 884 F.2d at 653 (Ocean Dumping Act); McLeod v. General Electric Co., 366 F.2d 847, 850 (2d Cir. 1966) (National Labor Relations Act); Kaynard ex. rel. NLRB v. Mego Corp., 633 F.2d 1026, 1033 (2d Cir. 1980) (same); Holt v. Continental Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983) (Title VII), cert. denied, 465 U.S. 1030, 104 S. Ct. 1294 (1984).

The cases on which the Government relies provide no support for its position that a showing of irreparable harm is unnecessary to obtain a statutory injunction under Section 401(a). Gov. Mem. at 6-7. All involved statutory injunctions issued under entirely different statutes. See, e.g., Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473 (2d Cir.), cert. denied, 515 U.S. 1122, 115 S. Ct. 2277 (1995) (Railroad Revitalization Act and Regulatory Reform Act ("4-R Act")); United States v. Diapulse Corp. of America, 457 F.2d 25 (2d Cir. 1972) (Food, Drug, and Cosmetic Act); SEC v. Management Dynamics, Inc., 515 F.2d 801 (2d Cir. 1975) (Securities Act of 1933 and Securities Exchange Act of 1934); United States v. Siemens Corp., 621 F.2d 499 (2d Cir. 1980) (Clayton Act). In addition, most were decided prior to the Supreme Court's 1982 Romero-Barcelo and 1987 Amoco decisions, holding that irreparable harm is generally not to be presumed merely from a statutory violation.

To be sure, since the Supreme Court's decisions in Romero-Barcelo and Amoco, the Second Circuit has continued to relieve the SEC "of the obligation, imposed on private litigants, to show risk of irreparable injury . . . or the unavailability of remedies at law" when seeking a statutory injunction. SEC v. Unifund Sal, 910 F.2d 1028, 1036 (2d Cir. 1990) (citations omitted). "That rule remains the law of this Circuit," doubtless because it has been consistently applied since the mid-1930's. Id., citing SEC v. Torr, 87 F.2d 446, 450 (2d Cir. 1937) and SEC v. Jones, 85 F.2d 17 (2d Cir.), cert. denied, 299 U.S. 581, 57 S. Ct. 46 (1946). By contrast, there is no comparable longstanding rule in this Circuit relieving the FCC of the obligation to show risk of irreparable harm and the unavailability of remedies at law when seeking a statutory injunction under Section 401(a). Cf. United States v. National Plastikwear Fashions, 123 F. Supp. 791, 793-94 (S.D.N.Y. 1954) (citing irreparable harm as reason for granting injunction under Section 401(b) compelling compliance with FCC cease-and-desist order against continued operation of heating equipment that interfered with army radio communications).

Similarly, the Second Circuit's recent adherence to the rule that a railroad seeking a statutory injunction from alleged tax discrimination under Section 11503(c) (formerly Section 306(2)) of the 4-R Act, 49 U.S.C. § 11503(c), need only show "'reasonable cause' to believe that a violation of the 4-R Act has occurred or is about to occur," Consolidated Rail Corp., 47 F.3d at 479 (citations omitted), is wholly inapposite to statutory injunctions under Section 401(a). That rule was first adopted in other circuits prior to the Supreme Court's 1982 Romero-Barcelo and 1987 Amoco decisions, in reliance on the Court's much earlier decision in United States v. City and County of San Francisco, 310 U.S. 16, 60 S. Ct. 749 (1940). See, e.g., Atchison, Topeka and Santa Fe Railway Co. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981). To the extent that San Francisco suggests that a statutory injunction must generally issue merely upon a showing of a statutory violation, that suggestion has been flatly rejected by the Supreme Court in Romero-Barcelo and Amoco. Later decisions granting statutory injunctions under Section 11503(c) of the 4-R Act without requiring a showing of irreparable harm merely follow Lennen and San Francisco with little analysis, failing to address the obvious relevance of Romero-Barcelo and Amoco.

Nor do the cases on which the Government relies even remotely suggest, let alone hold, that other equitable factors are irrelevant to whether an injunction should issue under Section 401(a) against Steal This Radio's unlicensed broadcasts. Indeed, those cases make amply clear that even when the Government sues as protector of the public interest, the grant of a statutory injunction remains an exercise of "equitable discretion," requiring a district court "to assess all those considerations of fairness that have been the traditional concerns of equity courts." SEC v. Management Dynamics, Inc., 515 F.2d at 808; accord Commodity Futures Trading Comm'n v. British American Commodity Options Corp., 560 F.2d 135, 141 (2d Cir. 1977) (recognizing "the equitable discretion vested with the court even in statutory injunction cases"), cert. denied, 438 U.S. 905, 98 S. Ct. 3123 (1978); United States v. Siemens Corp., 621 F.2d at 506 ("Nor does proof of likelihood of success on the merits relieve a court of equity of the duty to balance hardships, i.e., determine whether the harm to the defendants outweighs the likelihood that adequate relief will be available to the Government if the merger is consummated"). In short, "[t]he principles of equitable jurisprudence are not suspended merely because a government agency is the plaintiff." NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887, 893 (7th Cir. 1990).

Similarly, the cases involving statutory injunctions under Section 401 offer little support for the Government's position that traditional equitable criteria, including the threat of irreparable harm or lack thereof, are irrelevant to its request for a preliminary injunction against Steal This Radio's unlicensed radio broadcasts. Most involved statutory injunctions issued not under Section 401(a) but rather under Section 401(b) of the Act, which, as already noted mandates issuance of an injunction against anyone disobeying an FCC order that "was regularly made and duly served." 47 U.S.C. § 401(b). See, e.g., Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 740 F.2d 566 (7th Cir. 1984); Hawaii Telephone Co. v. Public Utilities Comm'n of State of Hawaii, 827 F.2d 1264 (9th Cir. 1987), cert. denied, 487 U.S. 1218, 108 S. Ct. 2870 (1988). The FCC has neither alleged, nor can it show, that Steal This Radio or its members have ever been "duly served" with a cease-and-desist order "regularly made" in compliance with Section 312 of the Act. 47 U.S.C. §§ 312(c), (d). See Pl. Mem. at 79-82.

To be sure, the district court opined in United States v. McIntire, 365 F. Supp. 618 (D.N.J. 1973), a case brought under Section 401(a) to enjoin unlicensed radio broadcasts, that "the application of the traditional equitable criteria of irreparable harm is eased in those cases where the activity against which the injunction is sought constitutes a violation of a federal statute." Id. at 623 (emphasis added). The court did not, however, state that the "irreparable harm" criteria is dispensed with altogether in such cases. Moreover, given that it expressly found "at

least two instances" in which the unlicensed radio broadcasts "ha[d] caused harmful interference with the broadcast signals of several duly licensed stations," id., the court's statement that the "irreparable harm" criteria "is eased" in Section 401(a) cases was merely dictum.

Similarly, while the district court in United States v. Medina, 718 F. Supp. 928 (S.D. Fla. 1989), a case in which the defendants did not even appear, ruled that the government need not demonstrate irreparable harm when seeking an injunction under Section 401(a), id. at 930, that ruling too was mere dictum, given that the unlicensed radio broadcasts at issue there occurred over frequencies used for aeronautical enroute communications, clearly posing a risk to public safety and thus plainly threatening irreparable harm. Id. at 929. Moreover, the two cases cited by the Medina court as support for the proposition that irreparable harm is irrelevant in Section 401(a) cases, Illinois Bell Telephone Co. v. Illinois Commerce Comm'n and United States v. McIntire, offer no such support, since, as already noted, the former was a Section 401(b) case and the latter merely stated --in dictum-- that the "irreparable harm" criteria was "eased" in Section 401(a) cases.

Finally, even if the Government did not otherwise have to demonstrate irreparable harm to obtain a statutory injunction under Section 401(a), it must do so in this case because plaintiffs' have colorable--indeed compelling--First Amendment defenses. This case is thus no different than those in which the statutory violation is "substantially disputed": "in statutory enforcement cases where the government can make only a 'colorable evidentiary showing' of a violation, the court must consider the possibility of irreparable injury." United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992)(distinguishing Diapulse). The Government has not cited, nor can it cite, any cases to support its patently frivolous assertion that a preliminary injunction should issue here even if plaintiffs have colorable defenses. Gov. Mem. at 9.

B. STEAL THIS RADIO'S UNLICENSED BROADCASTS POSE NO THREAT OF IRREPARABLE HARM

While the Government argues that broadcasts by unlicensed microradio stations "can cause" harmful interference to other broadcast and non-broadcast signals (Gov. Mem. at 17), it has not cited a single instance of such interference caused by Steal This Radio in the more than two-and-one-half years that Steal This Radio has been broadcasting almost daily (except for a two-month period immediately following FCC agent Judas Mansbach's first visit to Steal This Radio's studio). Based on the absence of any such record of interference caused by Steal This Radio, plaintiffs respectfully submit that the Government has utterly failed to make the showing of irreparable harm required for issuance of a preliminary injunction. See I.A, supra.

In any event, the accompanying affidavit of Douglas Forbes, a free-lance electronics technician with more than 15 years in various areas of audio electronics, including electronics customizing, assembly and repair, audio recording engineering, and FM radio transmitter design and assembly, should allay any concerns that Steal This Radio's transmitter may cause spurious emissions. To further allay any concerns about spurious emissions, Steal This Radio agrees to submit to an inspection of its transmitter by a qualified engineer selected by the Court.

Finally, plaintiffs respectfully request that the Court hold an evidentiary hearing to determine whether defendants have met their burden of establishing some actual or threatened irreparable injury. Town of Huntington, 884 F.2d at 654; see Corenco Corp. V. Schiavone & Sons, Inc., 362 F. Supp. 939, 944 (S.D.N.Y.), aff'd, 488 F.2d 207 (2d Cir. 1973); United States v. Gilman, 341 F. Supp. 891, 907 (S.D.N.Y. 1972). Moreover, at such a hearing, the Court "should consider and balance all the equities and interests presented for its determination." Romero-Barcelo, 456 U.S. at 311-13, 102 S. Ct. at 1802-03 (collecting cases).

C. THE GOVERNMENT IS UNLIKELY TO SUCCEED ON THE MERITS

Devoting barely three pages to the merits of plaintiffs' First Amendment challenges to the present broadcast licensing scheme and none to the merits of their constitutional and statutory challenges to the FCC's enforcement policies relative to microradio stations, the Government asserts that "plaintiffs have no colorable defenses" because plaintiffs' claims are "legally insufficient." Gov. Mem. at 9. For the reasons set forth in our earlier memorandum of law, we respectfully submit that those claims are more than legally sufficient and provide plaintiffs with colorable--indeed compelling --defenses to the Government's counterclaim. See Pl. Mem. at 33-90. Rather than repeat arguments previously advanced in support of plaintiffs' claims, we will briefly respond to the Government's few arguments.

1. Plaintiffs Do No Seek to Set Aside the Entire Regulatory Scheme for Radio Broadcasting.

Contrary to the Government's assertion, plaintiffs do not seek to have the "entire regulatory scheme" for radio broadcasting in place since 1934 "set aside." Gov. Mem. at 9. Plaintiffs thus do not contend that the present broadcast license requirement is unconstitutional for all broadcasters--only that it violates the First

Amendment rights of microradio stations, including Steal This Radio. See Am. Compl. ¶¶ 83-87; Pl. Mem. at 49-57. Similarly, while plaintiffs challenge the present broadcast license require-ment as applied to microradio stations, they do not contest the FCC's statutory authority to establish operating rules for such stations, to prevent signal interference and ensure public safety. See Pl. Mem. at 52-55.

2. Plaintiffs' Microbroadcasting Activities Are Protected by the First Amendment.

Refusing to concede that the unlicensed microbroadcasting activity in which plaintiffs are engaged is even worthy of any First Amendment protection, the Government broadly asserts that "it is well settled that there is no First Amendment right to broad-cast" and dismisses plaintiffs' claims as "based on the incorrect assumption that there is a constitutional right to broadcast that is burdened by the licensing scheme." Gov. Mem. at 10, 11. That simply is not so.

To be sure, the Supreme Court, through Justice Frankfurter, observed in the "Chain Broadcasting" case, decided more than 55 years ago, that "the right of free speech does not include . . . the right to use the facilities of radio without a license." National Broadcasting Co. v. United States, 319 U.S. 190, 227, 63 S. Ct. 997, 1014 (1943) ("NBC v. United States"). Justice Frankfurter's observation must, however, be read in the context in which it was made, that is, in response to the broadcast networks' assertion that the FCC could not, consistent with the First Amendment, "refuse licenses to persons who engage in specified network practices" prohibited by the FCC's Chain Broadcasting regulations. Id. at 226, 63 S. Ct. at 1014. Because there was no claim made that the license requirement itself contravened broadcasters' First Amendment rights, Justice Frankfurter's observation, given the broad reading urged by the Government in this case, was mere dictum and hence not controlling here:

"[i]t is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

United States v. Bell, 524 F.2d 202, 206 n.4 (2d Cir. 1975), quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398 (1821) (Chief Justice Marshall); accord Pierce v. Texas Dept. of Criminal Justice, Institutional Div., 37 F.3d 1146, 1150 n.1 (5th Cir. 1994) (rejecting literal reading of dictum in footnote of Supreme Court First Amendment decision because inconsistent with body of opinion), cert. denied, 514 U.S. 1107, 115 S. Ct. 1957 (1995).

Plaintiffs thus do not proceed on an "incorrect assumption" in maintaining that the present broadcast license requirement impermissibly burdens their First Amendment rights, as the Government erroneously contends. Gov. Mem. at 11. Nor do they "posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish," Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388, 89 S. Ct. 1794, 1806 (1969), as the Government also mistakenly argues. Gov. Mem. at 10. Instead, they posit only a First Amendment right to broadcast over a frequency within the spectrum dedicated to radio broadcasting subject to reasonable time, place and manner regulations that are even-handedly applied to all broadcasters, full-power and low-power alike. See First Am. Compl. at 2. Indeed, plaintiffs seek no more and no less than the same First Amendment rights available to engage in expressive activity in other traditional and designated public fora of unlimited character.

3. The Supreme Court's 1943 Decision in the "Chain Broadcasting" Case Is Not Dispositive Here.

To be sure, the Supreme Court in the Chain Broadcasting case expressly rejected a First Amendment challenge to the "public interest" standard under which the FCC makes decisions on broadcast licenses. NBC v. United States, 319 U.S. at 226, 63 S. Ct. at 1014. But contrary to the Government's assertion (Gov. Mem. at 11-12), that 55-year-old ruling is not and cannot be dispositive of plaintiffs' First Amendment challenge to the "public interest standard here.

First, the Supreme Court in the Chain Broadcasting case was not presented with any First Amendment claims based on the public forum doctrine -- a doctrine that was not even recognized until 1960, Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1960 Sup. Ct. Rev. 1, nor incorporated into the Court's First Amendment jurisprudence until 1972, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 n.3, 99-100, 92 S. Ct. 2286, 2289 n.3, 2292 (1972) -- such as plaintiffs pose here. See Pl. Mem. at 34-67. Second, and equally importantly, the Supreme Court in the Chain Broadcasting case did have before it the long record of viewpoint-based and capricious licensing decisions made by the FCC under the "public interest" standard which now exists. See Pl. Mem. at 60-64. Indeed, as Justice Frankfurter pointedly observed for the Court:

Congress did not authorize the [FCC] to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the [FCC] by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.

NBC v. United States, 319 U.S. at 226, 63 S. Ct. at 1014. Thus, notwithstanding the Government's assertion, the First Amendment challenge to the "public interest" standard made here and that made in the Chain Broadcasting case are not even remotely "similar" (Gov. Mem. at 12) but rather "wholly different," to borrow Justice Frankfurter's phrase.

Where, as here, the material facts on which a First Amendment issue involving broadcasting has previously been decided--say, for example, the constitutionality of the fairness doctrine--have changed, the Supreme Court has expressed no reluctance to revisit that issue in an appropriate case. FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 n.12, 104 S. Ct. 3106, 3117 n.12 (1984) ("As we recognized in Red Lion, . . . were it to be shown that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in that case") (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393, 89 S. Ct. 1794, 1808 (1984)). Nor did the FCC hesitate to reconsider the constitutionality of that doctrine in light of changes in the media environment and empirical evidence of the doctrine's chilling effect on broadcast speech. Syracuse Peace Council v. FCC, 867 F.2d 654, 656-57 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019, 110 S. Ct. 717 (1990). Given the enthusiasm with which the FCC reconsidered and repealed the fairness doctrine, the Government's and FCC's position here that the Supreme Court's ruling on the "public interest" standard in the Chain Broadcasting case more than 55 years ago forecloses plaintiffs' challenge here is plainly and simply chutzpah.

4. The Availability of Judicial Review Does Not Prevent the FCC from Exercising Virtually Unfettered Discretion Under the "Public Interest" Standard.

Citing the availability of judicial review of FCC licensing decisions in the D.C. Circuit, 47 U.S.C. § 402(b)(1), the Government suggests, albeit without discussion, that this prevents the FCC from exercising virtually unfettered discretion in making licensing decisions under the "public interest" standard. Gov. Mem. at 12. That suggestion is wrong on both the facts and the law.

As a factual matter, the D.C. Circuit "give[s] substantial deference to the FCC's judgment about where the public interest lies," California Ass'n of the Physically Handicapped, Inc. v. FCC, 840 F.2d 88, 94 (D.C. Cir. 1988), recognizing that the FCC enjoys "wide discretionary power" under the "public interest" standard. WOKO, Inc. v. FCC, 109 F.2d 665, 667 (D.C. Cir. 1939). In effect, the D.C. Circuit's "function" in reviewing licensing decisions made by the FCC is thus "a fairly limited one": we must be satisfied that the agency has given reasoned consideration to all the material facts and issues; that its findings of facts are supported by substantial evidence; and that if its notion of the public interest changes, that at least it has not deviated from prior policy without sufficient explanation.

Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 49 (D.C. Cir. 1978) (footnotes omitted), cert. dismissed, 441 U.S. 957, 99 S. Ct. 2189 (1979).

Thus, far from constraining the FCC's virtually unfettered discretion under the "public interest" standard, the availability of judicial review in the D.C. Circuit merely requires the FCC to provide a statement of reasons for its licensing decisions. "To allow these 'illusory' constraints to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little more than a high-sounding ideal." City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 769-70, 108 S. Ct. 2138, 2151 (1988) (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 89 S. Ct. 935, 938-39 (1969)). Moreover, "[e]ven if judicial review [of the FCC's licensing decisions] were relatively speedy, such review cannot substitute for concrete standards to guide the [FCC's] discretion." Id., 108 S. Ct. at 2151, (citing Saia v. New York, 334 U.S. 558, 560, 68 S. Ct. 1148, 1149 (1948)).

5. Plaintiffs Have Standing to Challenge the Government's Enforcement Policies Relative to Unlicensed Microradio Stations.

The Government's contention that plaintiffs lack standing to challenge the FCC's enforcement policies concerning microradio stations because they have not yet been applied to plaintiffs, Gov. Mem. at 12-13, is both legally and factually incorrect. First, the law is clear that a person need not expose herself to prosecution under a statute in order to challenge that statute in a federal court. See Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308 (1979); Steffel v. Thompson, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215-16 (1974); Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968). To establish standing, a plaintiff need only show "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," Babbitt, 442 U.S. at 298, 99 S. Ct. at 2308, by alleging that either (1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution. Id. at 298-99, 99 S. Ct. at 2309 (citing Younger v. Harris, 401 U.S. 37, 42, 91 S. Ct. 746, 749 (1971)); see also Renne v. Geary, 501 U.S. 312, 322, 111 S. Ct. 2331, 2339 (1991). This

standard, the courts have noted, "is quite forgiving." New Hampshire Right To Life Political Action Committee v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996).

Thus, when a plaintiff intends to engage in a specific course of conduct "arguably affected with a constitutional interest," which nonetheless is prohibited by law, she does not have to expose herself to enforcement to be able to challenge that law. Babbitt, at 298, 99 S. Ct. at 2308-09 (citations omitted). "'[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" Id. at 298, 99 S. Ct. at 2308 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593, 43 S. Ct. 658, 663 (1923)). The Government's argument that the lack of application of the enforcement procedures to plaintiffs precludes a finding of standing is thus clearly belied by the decisional authority. See Virginia v. American Booksellers Ass'n, 484 U.S. 383, 392-93, 108 S. Ct. 636, 642-43 (1988); Meese v. Keene, 481 U.S. 465, 472-73, 107 S. Ct. 1862, 1866-67 (1987).

Second, contrary to the Government's characterization of the allegations of the Amended Complaint, see Gov. Mem. at 12-14, plaintiffs have clearly alleged that the FCC, through field agent Judah Mansbach, ordered plaintiff members of Steal This Radio to cease and desist their broadcasting activities and threatened them with seizure of the station's broadcast equipment. Gudes Aff. ¶¶2-8; DJ Chrome Aff. ¶3; First Am. Compl. ¶¶72-74. In fact, Agent Mansbach specifically stated that he would immediately return with the United States Marshals to seize Steal This Radio's transmitter if the station did not immediately shut down. Gudes Aff. ¶¶2-8. It is significant in this regard that Mansbach does not deny these allegations in his own affidavit offered in support of the Government's motions. These facts plainly demonstrate the FCC's serious intention of enforcing the challenged statute against plaintiffs. See American Civil Liberties Union v. The Florida Bar, 999 F.2d 1486, 1492 (11th Cir. 1993); International Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809, 818 (5th Cir. 1979). The issuance of such a threat by one cloaked in governmental authority confirms plaintiffs' injury, by way of prior restraint, as well as their standing to raise the threatened seizure as a violation of their First and Fourth Amendment rights. Steffel, 415 U.S. at 459, 94 S. Ct. at 1215 (two police warnings to accused to stop handbilling or he would be prosecuted sufficient harm to confer standing); cf. Action for Children's Television v. FCC, 827 F. Supp. 4, 13 (D. D.C. 1993) (standing would be found if plaintiffs had been threatened with forfeiture proceedings), aff'd, 59 F.3d 1249 (D.C. Cir. 1995). Plaintiffs' continuing broadcast activities coupled with defendants' substantiated threats of prosecution clearly meet the requirements for injury articulated in Babbitt. 442 U.S. at 298, 99 S. Ct. at 2309 (standing exists when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution").

The threat of prosecution further injures plaintiffs by putting them between the proverbial rock and a hard place--absent the availability of pre-enforcement review, they must either engage in the expressive activity and thereby court prosecution and punishment, or succumb to the threat and forego free expression because of their well-founded fear of prosecution. See Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997); New Hampshire Right To Life Political Action Committee, 99 F.3d at 14; see also Babbitt, 442 U.S. at 298-99, 99 S. Ct. at 2308-09. When a challenged statute allegedly "chills" conduct protected by the First Amendment, the case presents a separate injury that is sufficient for standing purposes in addition to the injury which attends the threat of enforcement alone. See Navegar, Inc., 103 F.3d at 998-99; New Hampshire Right To Life Political Action Committee, 99 F.3d at 13. In the First Amendment context, "an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." Id., citing Meese, 481 U.S. at 473, 107 S. Ct. at 1867. In such situations, the vice of the statute is its pull toward self-censorship. See Virginia v. American Booksellers Ass'n, Inc., 484 U.S. at 393, 108 S. Ct. at 643; Dombrowski v. Pfister, 380 U.S. 479, 486-87, 85 S. Ct. 1116, 1120-22 (1965) (practical value of the First Amendment right may be destroyed if not vindicated before trial).

Even if such threats--and the chilling effect they have upon plaintiffs--were not sufficient to establish injury in fact, and they surely are, the violation of plaintiffs' statutory rights establishes such injury. As already noted, plaintiffs have specifically alleged that the FCC issued a cease and desist order to Steal This Radio. Plaintiffs have further alleged that the order was issued by the FCC without complying with Sections 312(c) and (d) of the Act, 47 U.S.C. §§ 312(c),(d): no order to show cause was served, plaintiffs were not provided with the requisite thirty days notice, no hearing was held, no written findings were made, and no order was issued. See Gudes Aff. ¶¶ 3-8; DJ Chrome Aff. ¶¶ 3-7; First Am. Compl. ¶¶ 73-75. The decisional authority interpreting the language of Section 312 makes clear that an administrative hearing is required prior to the issuance of a cease and desist order. See United States v. Southwestern Cable Co., 392 U.S. 157, 179, 88 S. Ct. 1994, 2006 (1968) ("cease and desist orders are proper only after hearing or waiver of the right to a hearing"); see also United States v. McIntire, 365 F. Supp. at 623; National Anti-Vivisection Soc'y v. FCC, 234 F. Supp. 696 (N.D. Ill. 1964). See Pl. Mem. At 79-82. The FCC's failure to accord plaintiffs these safeguards constitutes injury in fact for purposes of determining Article III standing requirements. See Yosemite Tenants Ass'n v. Clark, 582 F. Supp. 1342, 1361 (E.D. Cal. 1984) (Interior Department's failure to follow prescribed administrative steps in adjusting rents provides occupants with standing to challenge rental increases).

The Government's argument that plaintiffs lack standing to challenge the FCC's enforcement policies relative to microradio stations rests on three fatal flaws: 1) it posits--incorrectly--that plaintiffs have no First Amendment right to broadcast without a license, see Gov. Mem. at 13-14; 2) it assumes--again incorrectly--that speech broadcast over the radio spectrum without a license falls wholly outside the protection of the First Amendment; and 3) it improperly assumes the outcome of the case in defendants' favor. See Gov. Mem. at 15 ("Only a chilling effect on a right guaranteed by the Constitution could conceivably constitute an injury. Absent such a right, plaintiffs fail to allege a cognizable injury sufficient to give them standing."). Plaintiffs need not go so far in order to allege a constitutionally sufficient injury because the decisional authority is clear that pertinent course of conduct need only be "arguably affected with a constitutional interest," in order to support a pre-enforcement challenge to the law. Babbitt, at 298, 99 S. Ct. at 2308-09 (citations omitted).

At base, by contending that plaintiffs have not identified any "concrete harm caused them by the challenged statutes or policies," Gov. Mem. at 14, defendants imply that there is no longer any risk of prosecution by the FCC. Assuming arguendo that the Government intends this language to indicate that it no longer plans to shut down Steal This Radio through the enforcement policies challenged here, and plaintiffs' submissions to date plainly refute this characterization, that should not moot plaintiffs' challenge. The Government should not be permitted "to strategically prevent [the] controvers[y] [over those policies] from being resolved." Frank v. United States, 78 F.3d 815, 824 (2d Cir. 1996), vacated and remanded on other grounds, 117 S. Ct. 2501 (1997); cf. City of Mesquite v. Alladdin's Castle, Inc., 455 U.S. 283, 289, 102 S. Ct. 1070, 1074-75 (1982) (a case is not moot where a litigant abandons a challenged practice); United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 897 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case"); see also United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S. Ct. 361, 364 (1968)("Mere voluntary cessation of allegedly illegal conduct does not moot a case"). As Justice Stevens has explained, "[w]henever there is a risk that the defendant will return to his old ways,' the plaintiff continues to have a stake in the outcome -- its interest in not continuing to be subjected to the risk." Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 75, 104 S. Ct. 373 (1983) (Stevens, J., dissenting). Furthermore, the Government's recent conduct with regard to other microradio stations shows that it continues to follow the same policies elsewhere. See Presser Aff. ¶¶4-18.

More importantly, the "voluntary cessation" exception to the mootness doctrine serves the public interest by insuring that a determination is reached as to the legality of the challenged practice. See W. T. Grant Co., 345 U.S. at 632, 73 S. Ct. at 897. Indeed, if the Court were to adopt defendants' reasoning in this case, it would grant to the government the power unilaterally to prevent the resolution of a controversy by selectively choosing to abandon prosecution efforts and thereby destroy standing.
See Frank, 78 F.3d at 824.

The Government's reliance on Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318 (1972) (Gov. Mem. at 14) is entirely misplaced. In Laird, the Supreme Court denied standing to members of certain domestic political groups who had in the past been subject to surveillance by the U.S. Army because their constitutional claim was premised solely upon the allegation that the Army's data-gathering system engendered a "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause [them] direct harm." Id. at 13, 92 S. Ct. at 2325. The Court, however, distinguished that case from others in which it had found standing:
[I]n each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

Id. at 11, 92 S. Ct. at 2324-25 (emphasis in original).

That is precisely the situation here. There is a precise connection between the challenged regulatory system and plaintiffs' alleged chill. Furthermore, plaintiffs have demonstrated that they have already suffered, and continue to suffer, the real effects of this chill. DJ Thomas Paine Aff. ¶¶24-27. Thus, plaintiffs have standing here because they "ha[ve] alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder," Babbitt, 442 U.S. at 298, 99 S. Ct. at 2309, and that threat is both "real and immediate, not conjectural or hypothetical." O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 675 (1974) (internal quotations and citations omitted).

D. THE BALANCE OF EQUITIES TIPS DECIDEDLY AGAINST THE GOVERNMENT

Defendants' contention that they are entitled to an injunction is premised on two critical misconceptions. First, the decisional authority is clear that, absent specific statutory language evidencing Congressional intent to restrict judicial consideration of established equity principles, the government is not entitled to a presumption of irreparable injury leading to the issuance of a statutory injunction. See Amoco, 480 U.S. at 543, 107 S. Ct. at 1403; Hecht Co. v. Bowles, 321 U.S. at 328-30, 64 S. Ct. at 591-92. In this regard, the Supreme Court in Romero-Barcelo expressly

admonished courts to construe federal statutes "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." 456 U.S. at 320, 102 S. Ct. at 1807 (citations omitted).

Second, the Government mistakenly presumes that the public interest concerns raised here embody only its interest in maintaining the broadcast licensing scheme. This position is flawed in two respects. As noted in plaintiffs' memorandum of law in support of the motion for a preliminary injunction, the Government's scarcity rationale, previously asserted as the basis for the regulatory scheme, has been seriously questioned by many experts, including the FCC itself. Thus, the Government's claim that there is a "strong public interest in avoiding chaos on the airwaves," Gov. Mem. at 15, has been significantly compromised. Certainly, it is ironic that the FCC rejects the scarcity rationale when it seeks to deregulate existing broadcasters, but embraces that rationale when it seeks to suppress the expressive activities of microbroadcasters. On the other side of the equation, plaintiffs here clearly represent a significant range of public interests including, among others, the right of microradio stations' audiences to receive the information such stations broadcast, and the right of the broadcasters to air their views, news, and information to the public. Given these competing interests, the Government's attempt to claim an exclusive right of representation of the public interest simply cannot be credited. Following the analysis undertaken by the Supreme Court in Amoco, 480 U.S. at 543, 107 S. Ct. at 1403, this Court, applying equity principles, must first look to whether there are alternative means of ensuring compliance with the statutory requirements. Here, as in Amoco and Romero-Barcelo, compliance could be obtained by means of a cease and desist order or through other statutory mechanisms. See, e.g., 47 U.S.C. § 312(b)(authorizing the FCC to issue a "cease and desist" order to "any person who has violated or failed to observe any rule or regulation of the [FCC] authorized by this Act."). See Amoco, 480 U.S. at 543 n.8, 107 S. Ct. at 1405 n.8 (noting that an injunction was not the only means of ensuring compliance with the Act).

Second, as the Court did in Amoco, this Court must also examine whether a refusal to issue an injunction would undermine the substantive policy behind the statutory scheme. 480 U.S. at 544, 107 S. Ct. at 1404. Such an examination in this case reveals that the underlying policies of the broadcast licensing scheme favor plaintiffs' position. Indeed, as the statutory language and agency application over the years demonstrate, the overall goal of the scheme is to serve the "public interest."

As in Amoco, defendants here urge the Court to undertake a superficial analysis that would focus solely on the statutory procedure rather than on the underlying policy. Id. In so urging, defendants mistakenly hope to garner the benefit of a presumption of irreparable harm. See Gov. Mem. at 15. However, "[t]his presumption is contrary to traditional equitable principles and has no basis in [the statute]." Amoco, 480 U.S. at 545, 107 S. Ct. at 1406. As the Second Circuit confirmed in Town of Huntingt
on, "a threat of irreparable injury must be proved, not assumed, and may not be postulated eo ipso on the basis of procedural violations . . . ." 884 F.2d at 653. In Town of Huntington, the Court of Appeals noted that Second Circuit authority--consistent with the Supreme Court's decision in Romero-Barcelo--holds that a NEPA violation does not constitute per se irreparable harm requiring the issuance of injunctive relief; rather such relief requires a showing of "substantial danger to the environment, in addition to a violation of procedural requirements . . . ." Id. Moreover, this Court must require the agency to "make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks." SEC v. Unifund SAL, 910 F. 2d at 1039. In this case, there has been no showing of injury whatsoever by defendants. Furthermore, any such showing must be weighed against the harms that would be visited on plaintiffs as a result of the issuance of an injunction. Amoco, 480 U.S. at 545, 107 S. Ct. at 1404.

In evaluating the parties' competing claims of irreparable harm, the Court must also consider plaintiffs' equitable defenses of laches and unclean hands. See SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975) (noting that "in deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts."). Laches bars a claim in its entirety where "it is clear that a plaintiff unreasonably delayed in initiating action and this delay prejudiced the defendant." United States v. International Brotherhood of Teamsters, Etc., 816 F. Supp. 864, 871 (S.D.N.Y. 1992) (citing Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423 (2d Cir. 1992)), aff'd, 986 F.2d 15 (2d Cir. 1993). Prejudice arises when a delay results in a "change in position" which makes it inequitable to allow the plaintiff's claim to proceed. Robins Island, 959 F.2d at 424.

Although as a "general rule" laches on the part of the government "is no defense to a suit by it to enforce a public right or protect a public interest," Nevada v. United States, 463 U.S. 110, 141, 103 S. Ct. 2906, 2924 (1983), this Court has considered such defenses when proffered in the appropriate equitable context. See, e.g., United States v. International Brotherhood of Teamsters, Etc., 829 F. Supp. 608, 615 (S.D.N.Y. 1993); United States v. International Brotherhood of Teamsters, Etc., 816 F. Supp. at 871. In this case, the FCC permitted Steal This Radio to broadcast without a license for two years. During this time, the agency did not visit the station or provide any notice whatsoever of its intention to prosecute the microradio station or its broadcasters. In fact, the FCC's first visit came only after the station's members exercised their free speech rights to promote microradio. DJ

Thomas Paine Aff. ¶¶20-27. Moreover, the FCC has delayed any effort to legalize microradio for more than a decade. Plainly such circumstances demonstrate an unreasonable delay. See Stone v. Williams, 873 F.2d 620, 624 (2d Cir. 1989)("it is the reasonable-ness of the delay rather than the number of years that elapse which is the focus of the inquiry"), cert. denied, 493 U.S. 959, 110 S. Ct. 377 (1989). Moreover, although this lack of diligence, standing alone, may be insufficient to support a claim of laches, "it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction." Citibank, N.A., 756 F.2d at 276; see Majorica, S.A. v. R.H. Macy & Co., Inc., 762 F.2d 7, 8 (2d Cir. 1985) ("Lack of diligence, standing alone, may, however, preclude the granting of injunctive relief, because it goes to primarily to the issue of irreparable harm rather than occasioned prejudice."). Thus, in cases where, as here, there is a significant delay in applying for injunctive relief, such a delay undermines any claim by the movant that the alleged infringement will cause irreparable harm pending trial. See Citibank, N.A., 756 F.2d at 276.

Further tipping the balance in plaintiffs' favor is the long-standing equitable principle that relief will not be afforded a party with unclean hands. The Original Great American Chocolate Chip Cookie Company, Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 281 (7th Cir. 1992); Shondel v. McDermott, 775 F.2d 859, 868 (7th Cir. 1985); American Hospital Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 601 (7th Cir. 1985). As noted above, the FCC only sought to enforce the licensing scheme after Steal This Radio began promoting microradio, and the National Association of Broadcasters insisted on such enforcement. A court may appropriately deny a request for injunctive relief based on the defense of unclean hands "'where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party.'" Estate of Lennon v. Screen Creations, Ltd., 939 F. Supp. 287, 293 (S.D.N.Y. 1996) (quoting Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1383 (6th Cir. 1995)).

The doctrine of unclean hands also gives recognition to the fact that "equitable decrees may have effects on third parties--persons who are not parties to a lawsuit, including taxpayers and members of the law-abiding public--and so should not be entered without consideration of those effects." Byron v. Clay, 867 F.2d 1049, 1051 (7th Cir. 1989). Such consideration similarly weighs in plaintiffs' favor. The public's interest here lies in receiving the information broadcast by plaintiffs, rather than in fulfilling and maintaining the obsolete scarcity rationale proffered by defendants. Equitable relief should be withheld if its exercise would be "contrary to the public interest." Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492, 62 S. Ct. 402, 405 (1942); see also Amoco, 480 U.S. at 542, 107 S. Ct. at 1402 (acknowledging the important role of public interest considerations in the exercise of equitable discretion).

An assessment--with the proper equitable balancing--of defendants' request for a preliminary and permanent injunction in this case must conclude with the determination that such relief is not warranted. "An injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable." Romero-Barcelo, 456 U.S. at 312, 102 S. Ct. at 1803 (emphasis added) (internal quotation and citation omitted); see also Am
oco, 480 U.S. at 542-45, 107 S. Ct. at 1402-04.

II.
THE COURT SHOULD DENY THE GOVERNMENT'S MOTION TO DISMISS

On a motion to dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b), the court "must accept as true all material allegations of the complaint and must construe it in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206 (1975); Katz v. Klehammer, 902 F.2d 204, 206 (2d Cir. 1990). The Government has completely ignored this standard. For this reason, and for those set forth in plaintiffs' memorandum of law in support of the motion for a preliminary injunction and in Point I.B, supra, the Government's motion to dismiss should be denied.

CONCLUSION

For the foregoing reasons, the Government's motions for a preliminary injunction and to dismiss the Amended Complaint should be denied in their entirety.

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Respectfully submitted,

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